No. 10-1491

IN THE

Supreme Court of the United States

ESTHER KIOBEL, individually and on behalf of her late husband, DR. BARINEM KIOBEL, BISHOP AUGUSTINE NUMENE JOHN-MILLER, CHARLES BARIDORN WIWA, ISRAEL PYAKENE NWIDOR, KENDRICKS DORLE NWIKPO, ANTHONY B. KOTE-WITAH, VICTOR B. WIFA, DUMLE J. KUNENU, BENSON MAGNUS IKARI, LEGBARA TONY IDIGIMA, PIUS NWINEE, KPOBARI TUSIMA, individually and on behalf of his late father, CLEMENT TUSIMA,

Petitioners,

vs.

ROYAL DUTCH PETROLEUM CO., SHELL TRANSPORT AND TRADING COMPANY PLC, SHELL PETROLEUM DEVELOPMENT COMPANY OF NIGERIA, LTD.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONERS' REPLY BRIEF

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INTRODUCTION

Respondents' Brief in Opposition ("Opp. Cert") confirms the reasons petitioners have presented for review in this Court.

Respondents try to defend the panel majority's unprecedented Alien Tort Statute ("ATS") analysis as a straightforward application of this Court's decision in *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004). However, no other appellate court has accepted the panel majority's reasoning. As Judge Posner recently observed, the Second Circuit's decision is an "outlier." *Flomo v. Firestone Natural Rubber Co.*, 643 F.3d 1013, 1017 (7th Cir. 2011). Indeed, since the Petition was filed the D.C. and Seventh Circuits have explicitly rejected the Second Circuit's reasoning and have held that corporations may be sued under the ATS. *Id.* at 1021, *see also Doe v. Exxon*, No. 09-7125, 2011 WL 2652384 at *35 (D.C. Cir. July 8, 2011).

The panel majority rests its entire analysis on a patently erroneous interpretation of footnote 20 in the *Sosa* decision. Respondents base their opposition on the same error. Footnote 20 simply did not decide that an ATS plaintiff was required to prove a customary international norm providing for civil or criminal actions against every category of ATS defendant. In any event, the rejection of this proposition in *Flomo*, 643 F.3d at 1019, in *Doe v. Exxon*, 2011 WL 2652384, at *30, and in Judge Leval's scholarly opinion below, 621 F.3d 111, 149 (2d Cir. 2010), underscores the need for this Court to decide the issues presented in the Petition.

The panel majority adopted an analysis utterly in conflict with this Court's methodology in *Sosa*. This Court adopted Judge Edwards' analysis in *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 778, 782 (D.C. Cir. 1984) (Edwards, J., concurring), that domestic law supplies the contours of an ATS cause of action so long as plaintiffs allege a violation of the law of nations actionable under the *Sosa* test. *Sosa*, 542 U.S. at 730-31. International law does not ordinarily prescribe the universe of civil defendants, or indeed any of the rules, in civil tort litigation in any nation. Adopting the panel majority's methodology would render the ATS a dead letter, a result explicitly foreclosed by this Court in *Sosa*. *Id.* at 719 ("There is too much in the historical record to believe that Congress would have enacted the ATS only to leave it fallow indefinitely."); *see also, Flomo*, 643 F.3d at 1019 ("If a plaintiff had to show that civil liability for such violations was itself a norm of international law, no claims under the Alien Tort Statute could ever be successful, even claims against individuals: only the United States, as far as we know, has a statute that provides a civil remedy for violations of customary international law.")

Instead, this Court's observation in *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 438 (1989), that the ATS "by its terms does not distinguish among classes of defendants" should govern this issue. Nothing in the language, history or purpose of the ATS or in ATS jurisprudence, before or after *Sosa*, supports the panel majority's extraordinary opinion.

More importantly, the majority's decision created a split between the Second Circuit, on one hand, and the D.C., Seventh and Eleventh Circuits[1], on the other, on the issue of whether there is corporate liability under the ATS. Human rights victims and corporations now lack guidance on this issue and will inevitably turn to this Court to resolve the ongoing conflict created by the Second Circuit's decision. There is an urgent need for this Court to resolve this dispute for all parties in the many ATS cases pending across the country against juridical entities.

I. THE ISSUE OF WHETHER CORPORATIONS MAY BE SUED UNDER THE ALIEN TORT STATUTE IS NOT A MATTER OF SUBJECT MATTER JURISDICTION.

A. The Second Circuit Decision Conflicts With This Court's Decisions.

The majority decision below is the first and only appellate decision to hold that corporations may not be sued under the ATS. As demonstrated in the Petition, the assertion of subject matter jurisdiction over corporations and other juridical entities has been routine in ATS cases. Pet. 18-20, n. 10 and 11.

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[1] *See, e.g., Romero v. Drummond Co.*, 552 F.3d 1303, 1315 (11th Cir. 2008)

Respondents' attempt to distinguish this Court's cases, *e.g. Reed Elsevier, Inc. v. Muchnick*, 130 S. Ct. 1237 (2010), on the grounds that the ATS is a "jurisdictional" statute demonstrates a profound misunderstanding of this Court's decision in *Sosa*. Opp. Cert.10-11. This Court's cases make it clear that the identity of particular defendants subject to suit under a statute is a merits issue, not a subject matter jurisdiction issue.

Although this Court found that the ATS was a "jurisdictional" statute in *Sosa*, it immediately emphasized that the Founders intended the ATS to have immediate effect, allowing the federal courts to enforce law of nations violations by means of federal common law causes of action. 542 U.S. at 719. Thus, this Court did not hold or even remotely suggest that every aspect of an ATS cause of action was a matter of subject matter jurisdiction, as respondents claim. The only jurisdictional requirements required under the ATS are an "alien" plaintiff, a "tort" claim, and a "violation" of the "law of nations." There is no question that plaintiffs satisfied each of these elements in this case.

Respondents' more fundamental misunderstanding of this Court's *Sosa* decision is its misstatement of the significance of footnote 20 in *Sosa*. Footnote 20 concerned the issue of distinguishing between law of nations norms which require a showing of state action (e.g. torture) and those norms which can be committed by private parties, be they corporations or private individuals (e.g., genocide, piracy). The footnote did not establish

that a plaintiff had to demonstrate that a particular category of private actor was specifically addressed by the law of nations.

No other appellate court has adopted the panel majority's interpretation of footnote 20. Most recently, the D.C. and Seventh Circuits have rejected the panel majority's interpretation of footnote 20 and its holding that corporations may not be sued under the ATS. *Doe v. Exxon*, 2011 WL 2652384, at *30, 35; *Flomo,* 643 F.3d at 1021.

B. The Second Circuit's Decision Conflicts With The Decision Of Other Circuits.

Respondents ask this Court to ignore the substantial body of ATS jurisprudence involving claims against juridical entities, including corporations, by arguing, as the panel majority did, that this issue has been "lurking" in the background of the numerous ATS cases against juridical entities for decades. Opp. Cert 14. However, the reason no court has considered this issue is that there has never been any plausible basis for limiting the scope of defendants under the ATS. *Amerada Hess*, 488 U.S. at 438 (1989)("[The ATS] by its terms does not distinguish between classes of defendants").

C. There Was No Basis For The Second Circuit To Decide The Issue Of Corporate Liability.

Under *Yamaha Motor Corp. USA v. Calhoun*,

516 U.S. 199, 205 (1996), the court of appeals has jurisdiction under 28 U.S.C. §1292(b) to address any question that is included in the order defining the controlling question of law issued by the district court. The court of appeals "may not reach beyond the certified order to address other orders made in the case . . . the appellate court may address any issue fairly included within the certified order." *Id.*

The district court certified only the issue of whether certain international human rights norms were actionable after this Court's decision in *Sosa*. Pet. App. B-21-23. The district court was not asked to and did not resolve any issue relating to corporate liability in the proceedings giving rise to this appeal. Under *Yamaha* the court of appeals had no jurisdiction to reach out and decide this issue *sua sponte*.

II. CERTIORARI IS WARRANTED TO DETERMINE WHETHER CORPORATIONS ARE IMMUNE FROM TORT LIABILITY UNDER THE ATS.

The circuit split on the issue of corporate liability under the ATS has become even clearer since the Petition was filed. The D.C. and Seventh Circuits have joined the Eleventh Circuit in rejecting the Second Circuit's decision below. Respondents' arguments for ignoring this unequivocal split are unavailing.

A. This Court's Decision In *Sosa* Does Not Mandate Corporate Immunity In ATS Cases.

1. The Language, History And Purpose Of The ATS Support Corporate Liability.

As this Court stated in *Amerada Hess* the language of the ATS does not exclude any category of defendant. 488 U.S. at 438. Respondents' statement that "the law of nations does not include corporations in that universe" is plainly wrong. *See Doe v. Exxon*, 2011 WL 2652384, at *23. This is the fundamental error in the majority's analysis.

The law of nations prescribes certain norms of behavior. Some of those norms apply directly to private actors (e.g. the prohibition against genocide). As Judge Edwards emphasized in his concurring opinion in *Tel-Oren*, 726 F. 2d at 778 (Edwards, J., concurring), and as adopted in *Sosa*, the law of nations does not prescribe the manner in which any nation enforces its norms. Whether the federal common law cause of action recognized under the ATS applies to juridical entities is a matter of U.S. domestic law and not international law.

Similarly, respondents simply ignore the abundant history indicating that the Founders understood that tort liability applies to juridical entities generally and also that law of nations claims

were ordinarily made against juridical entities (e.g. ships) in addition to people.

Respondents' interpretation of the purposes of the ATS also misses the mark. Opp. Cert. 20-21. This Court's admonitions about "vigilant doorkeeping" in *Sosa* had to do with the recognition of new law of nations claims, like the broad claim of arbitrary arrest made in the *Sosa* case, not with the universe of defendants subject to suit for violations meeting the test set forth in the *Sosa* decision. Indeed, this Court endorsed the rulings in most pre-*Sosa* ATS cases. 542 U.S. at 724-725. Once a claim has been recognized as actionable under *Sosa* the ATS does provide broad remedies to respond adequately to the violations.

2. The *Kiobel* Decision Is Inconsistent With This Court's View Of Federal Common Law In *Sosa*.

This Court held that the cause of action recognized under the ATS was to be derived from federal common law. *Sosa*, 542 U.S. at 712, 721 and 724. The use of federal common law to remedy law of nations violations was authorized for norms meeting the "historical paradigm" test. However,

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[2] This history is set forth in detail in the *Amicus Curiae* Brief filed by Professors of Legal History. The authors include three of the historians who submitted the Historians brief relied on by this Court in *Sosa*. Respondent does not even attempt to challenge their submissions.

Respondents' attempt to incorporate its self-serving views of the meaning of footnote 20 as an integral part of the "historical paradigm" test is not supported by *Sosa*. No amount of linguistic alchemy can transform footnote 20 into the central holding of the *Sosa* decision. As discussed above, footnote 20 in *Sosa* did not address the issue of corporate liability, nor did it require a plaintiff to demonstrate that international law applied to a particular category of private actor. Petitioners have alleged clear violations of the law of nations, including extrajudicial executions, torture and crimes against humanity. This is all *Sosa* requires.[3]

Moreover, this Court did not make ATS actions dependent on proof of a violation of international criminal law. Opp. Cert. 24-25. This is another invention of the panel majority. The ATS is a civil tort statute, not a criminal statute. The Founders explicitly created a statute providing tort remedies for law of nations violations without reference to international criminal law. There is no other ATS decision that requires an ATS plaintiff to prove a violation of international criminal law; nor is there anything in *Sosa* that imposes such a requirement. The panel majority's reliance on international criminal law is yet another critical part of its

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[3] Respondents' reference to *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 65-66 (2001), is irrelevant in this context because Congress has authorized ATS actions, unlike judicially created *Bivens* actions.

reasoning that is in conflict with all other ATS jurisprudence.[4] It should be rectified by this Court.

3. The Second Circuit Improperly Ignored General Principles Of Law Establishing Corporate Liability.

The Second Circuit and respondents make the same error in confusing customary international law and general principles of law. Opp. Cert. 27-28. General principles do not require a showing of *opinio juris*, as respondents claim (Opp. Cert. 28), and are part of international law in the same way customary international law is. *See, e.g., Flores v. S. Peru Copper Corp.*, 414 F.3d 233, 251 (2d Cir. 2003). As set forth in the *Amicus Curiae* Briefs filed by International Law Scholars, at 14, and Center for Constitutional Rights, et al., at 14-15, corporate liability of some form (criminal, civil or administrative) is part of every legal system and qualifies as a general principle of law. Thus, even if recourse to international law was required, there is little doubt that corporations may be and are held accountable for international law violations of the kind redressable under the ATS within domestic legal systems.

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[4] *See generally, Amicus Curiae* Brief filed by Ambassador David Scheffer.

B. The *Kiobel* Decision Is As Far-Reaching As Petitioners Contend.

The Second Circuit's decision may lead to the dismissal of all ATS cases against corporations and other juridical entities in that Circuit. If this decision is allowed to stand, plaintiffs will not be able to sue corporations in New York or Connecticut but will be able to in the rest of the country. The decision will continue to cause confusion and delay in ATS cases.

C. This Case Is A Perfect Vehicle To Decide This Issue.

This case presents the issue of corporate liability squarely. Indeed, this is the only issue presented by the decision below. Respondents suggest that they will raise a litany of "alternative grounds for affirmance" if this Court grants review in this case. Opp. Cert. 31, n. 22. Petitioners will not address these issues at this point and this Court can limit its consideration in this case to the issues actually decided by the Second Circuit. Respondents will have a chance to raise other grounds for affirmance on remand in the Court of Appeals.

There is one argument petitioners do address here. Respondents claim that reversal will have no impact on the outcome of *this* case because all three members of the panel supported dismissal of plaintiffs claims. This is wrong.

Two members of the panel voted to dismiss plaintiffs' claims because they found no corporate liability under the ATS. 621 F.3d at 149. Judge Leval dissented from that holding but would have dismissed because of deficiencies in plaintiffs' pleadings. *Id.* at 149, 153. Neither of the other panel members joined in that view. Thus, if this Court remands this case the panel would have to decide that issue, and any other remaining issues, for the first time. This Court cannot assume that the panel majority will subscribe to Judge Leval's view that plaintiffs' pleadings were insufficient.

Moreover, if plaintiffs' complaint is dismissed on the grounds urged by Judge Leval, the district court would have the discretion to allow plaintiffs to amend their pleadings to address those deficiencies. Thus, this Court's decision on the corporate liability issue is of crucial and dispositive importance in this appeal and this Court is petitioners' only forum for the resolution of this issue.

D. Review Is Not Premature.

The D.C., Seventh and Eleventh Circuits all allow corporations to be sued under the ATS. The decision below is the only appellate decision to find otherwise. At least half of the judges on the Second Circuit also disagree with the majority's reinterpretation of ATS jurisprudence. 642 F.3d 268 (2d Cir. 2011) (order denying panel rehearing) (Leval, J., dissenting), 642 F.3d 379 (2d Cir. 2011) (order denying *en banc* review) (Lynch, J., Pooler, J., Katzmann, J., Chin, J., dissenting). Although it is

true that this issue is being considered in other courts, none of those future decisions will eliminate the split in the Circuits.

It makes no sense to allow ATS cases to be filed against corporate defendants in Chicago or Atlanta but not in New York or Hartford. Review by this Court at this time will resolve this issue so plaintiffs and defendants in these cases know where they stand.

CONCLUSION

For all these reasons, this Court should grant the Petition.

Dated: September 1, 2011

Respectfully Submitted,

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